IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO (Ord) No.496 of 2002.
Reserved on:11.06.2007.
Decided on: July 06, 2007

Roshan Lal ***..Appellant.***

VERSUS

Mathro Devi & Ors. ***..Respondents.***

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellant: **Mr.Sanjeev Kuthiala, Advocate.**

For the respondents: **Mr.Ajay Sharma, Advocate.**

Kuldip Singh, Judge

The applicant / plaintiff is in appeal against the order dated 1.10.2002 passed by learned District Judge, Una in Civil Miscellaneous Application No.125 of 1998 dismissing the application of applicant under Order XXII Rules 4 & 9 read with Section 151 CPC, refusing to set aside the abatement of the appeal which was dismissed as having abated on 2.9.1998.

2. The facts, in brief, are that applicant Roshan Lal filed a suit for declaration, permanent prohibitory injunction and in the alternative for possession against original defendant Inder Singh which was dismissed on 22.8.1992 by learned Sub Judge 1st Class (2), Amb. Applicant filed appeal against the decision dated 22.8.1992. On

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment ? Yes***

2.4.1998 Shri Y.R.Sharma, Advocate appeared on behalf of the applicant / appellant in the lower appellate Court and represented that respondent had died, time was sought for filing application for bringing on record legal representatives of deceased respondent, but no such application was filed and ultimately on 2.9.1998 the learned District Judge dismissed the appeal as having abated.

3. The applicant on 17.12.1998 filed an application under Order XXII Rules 4 and 9 read with Section 151 CPC for setting aside abatement of the appeal and bringing on record legal representatives of deceased respondent Inder Singh. In the application, it has been alleged that applicant is a rustic villager and he could not bring to the notice of his counsel the factum of death of respondent, therefore, required application for bringing on record legal representatives of respondent could not be filed. The date of death of Inder Singh was given in the application as 28.11.1997. The applicant with great efforts could find out the names and addresses of the legal representatives of the deceased respondent Inder Singh and only thereafter the application was filed for bringing on record legal representatives of deceased respondent Inder Singh.

4. It has also been stated in the application that the applicant on 18.9.1998 received certified copy of the order dated 2.9.1998 passed by the lower appellate Court. He was advised to file an appeal against the order dated 2.9.1998 in the High Court but the Advocate at Shimla advised him to file appropriate application in the

lower appellate Court. The applicant contacted his counsel Shri Narender Sharma, who contested the case in the lower appellate Court and on his advice the applicant filed the application. In the application he has made averments for condonation of delay.

5. The application has been contested by filing reply in which preliminary objections of maintainability and lack of material particulars have been taken. On merits, it has been submitted that the applicant has failed to make out any case for condonation of delay. The applicant has concocted a false story and, therefore, applicant is not entitled to any indulgence of the Court. The learned lower appellate Court dismissed the application, hence, the applicant is in appeal.

6. I have heard the learned counsel for the parties and have also gone through the record.

7. The learned counsel for the applicant / appellant has submitted that the lower appellate Court has taken very strict view. No doubt, the application, which was filed by the applicant, was barred by time but keeping in view the facts and circumstances of the case instead of taking a liberal approach the Court below proceeded to consider the matter highly technically and has erred in dismissing the application. He has prayed for setting aside abatement of the appeal and bringing on record legal representatives of deceased respondent. On the other hand, the learned counsel for the legal representatives of respondent has submitted that the lower appellate Court has rightly

dismissed the application of the applicant. The applicant has concocted a false story and, therefore, he is not entitled to any relief in equity also. On merits also, the trial Court has found nothing in the suit of the applicant which after full trial was dismissed.

8. The original respondent Inder Singh died on 28.11.1997. The factum of death of respondent Inder Singh was not brought to the notice of the lower appellate Court till 2.4.1998 when Shri Y.R. Sharma, Advocate appearing on behalf of the applicant in the lower appellate Court prayed time for bringing on record legal representatives of deceased respondent. The appeal in the lower appellate Court was being pursued by Smt.Kamla Devi, Special Attorney of the applicant. In the application, the applicant has pleaded that, he, being rustic person could not bring the factum of death to the notice of his counsel but there is no averment with respect to Smt.Kamla Devi, Special Attorney why she did not bring to the notice of counsel the factum of death of respondent Inder Singh. In any case, on 2.4.1998 Shri Y. R.Sharma, Advocate appearing on behalf of the applicant represented to the Court and prayed time to bring on record legal representatives of deceased respondent Inder Singh. The applicant has averred in the application that he made efforts but he could not search the names of legal representatives of deceased respondent Inder Singh. In Para-4 of the application, the names and addresses of legal representatives of deceased respondent Inder Singh have been given and surprisingly all of them are residents of

village Dangoh which is also the village of applicant Roshan Lal. It is not believable that parties residing in the same village were not aware of the names and addresses of each other. Moreover, in the application it has not been averred as to when the applicant came to know about the names and addresses of the legal representatives of deceased respondent Inder Singh. This becomes relevant when applicant is making prayer for condonation of delay in filing the application which was filed on 17.12.1998 even though respondent Inder Singh has died on 28.11.1997.

9. In the application, it has been submitted that after obtaining certified copies of the order dated 2.9.1998 on 18.9.1998, the applicant was advised by his legal advisors to file appeal against the order dated 2.9.1998 in the High Court. The applicant has not stated who advised him to file appeal in the High Court against the order dated 2.9.1998 nor the applicant has stated in the application who advised him at Shimla to go back and file appropriate application in the lower appellate Court. As early as on 2.4.1998 Shri Y.R. Sharma, Advocate appearing on behalf of applicant sought time to file application for bringing on record legal representatives of deceased respondent Roshan Lal.

10. The applicant in the application has further stated that after returning from Shimla he contacted his counsel who contested the case in the lower Court who advised him to file application in the lower appellate Court and in these circumstances the application was

filed by the applicant. Here again, it has not been made clear by the applicant when Shri Narender Sharma advised him to file such application in the lower appellate Court.

11. It is significant to note here that the appeal in the lower appellate Court was filed by the applicant through Shri Sushil Verma, Advocate and not by Shri Narender Sharma, Advocate. Therefore, the plea of the applicant that he contacted Shri Narender Sharma, Advocate who contested the case in the lower appellate Court is also not correct. In fact, Shri Narender Sharma was not advocate of the applicant even in the trial Court.

12. No doubt, the condonation of delay application in certain circumstances is to be construed liberally but liberal construction is to be given in favour of that party who approaches the Court with clean hands and not in favour of such party who concocts a false story.

13. In ***Sitaram Ramcharan & Others Versus M.N.Nagrashana & Others [AIR 1960 SC 260],*** the Supreme Court in Para-19 has held as follows:-

> "… …It cannot be disputed that in dealing with the question of condoning delay under S.5 of the Limitation Act the party has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time, and this has always been understood to mean that the explanation has to cover the whole of the period of delay (Vide *Ram Narain Joshi v. Parmeshwar Narain Mehta, ILR 30 Cal 309 (PC)…. …"

In ***Binod Bihari Singh Versus Union of India [(1993) 1 SCC 572],*** in Para-10 it has been held as under:-

> "… … That apart, the appellant, in this case, having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the respondent…. …"

In ***P.K.Ramachandran Versus State of Kerala & Another [(1997) 7 SCC 556],*** in Para-6 it has been held as follows:-

> "Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds… …"

14. In view of the above, there is force in the contention of learned counsel for the respondents that application filed by the applicant for setting aside the abatement and bringing on record the legal representatives of deceased respondent Inder Singh is based upon falsehood. The applicant / appellant has failed to make out any case for condonation of delay in filing the application and for setting aside abatement. The applicant is not entitled to any indulgence. The learned lower appellate Court has rightly appreciated the material on record in dismissing the application of applicant for bringing on record legal representatives of deceased respondent Inder Singh. Moreover,

it is not a case where the lis between the parties has not at all been decided. In the present case, at least trial Court has decided the matter and dismissed the suit of the applicant / plaintiff.

15. A contention has also been raised by the learned counsel for the respondent that application under Order 22 Rules 4 & 9 read with Section 151 C.P.C. filed by the applicant in the lower appellate Court was admittedly time barred and no application under Section 5 of the Limitation Act was filed along with the application for setting aside the abatement, therefore, the application under Order 22 Rules 4 & 9 read with Section 151 C.P.C. was not maintainable. The perusal of application would show that it is a composite application wherein not only prayer for setting aside abatement has been made but in the body of the application request has also been made for condonation of delay. This Court, in ***Mussadi & Others Versus Jai Gopal & Others, 1994(1) SLJ 90,*** has held that such composite application is maintainable. Therefore, the contention of learned counsel for respondent is rejected and it is held that the application filed by the applicant for setting aside the abatement and bringing on record legal representatives of deceased respondent Inder Singh was maintainable.

16. In view of the above discussion, the appeal is dismissed with no order as to costs.

(Kuldip Singh)
Judge.

July 6, 2007
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